TAN KIM HOR & ORS

v.

TAN HENG CHEW & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[COMPANIES WINDING-UP PETITION NO: D3(D2)-28-507-2001]
14 JUNE 2004

CIVIL PROCEDURE: *Amendment - Petition - Companies winding-up petition - Whether petitioners' proposed amendments to petition barred by doctrines of res judicata and issue estoppel - Whether 'new events' via proposed amendments already determined on their merits before - Whether there would be abuse of process of court - Principles in amendment of pleadings - Whether also applicable to winding-up petitions - Companies Act 1965, s. 221(2)(e) - Rules of the High Court 1980, O. 20 rr. 5 & 7 - Injustice - Bona fides of application - Prejudice and compensation with costs - Character of suit*

COMPANY LAW: *Winding-up - Petition - Amendment - Whether petitioners' proposed amendments to petition barred by doctrines of res judicata and issue estoppel - Whether 'new events' via proposed amendments already determined on their merits before - Whether there would be abuse of process of court - Principles in amendment of pleadings - Whether also applicable to winding-up petitions - Companies Act 1965, s. 221(2)(e) - Rules of the High Court 1980, O. 20 rr. 5 & 7 - Injustice - Bona fides of application - Prejudice and compensation with costs - Character of suit*

After having filed a petition ('D2-28-507-2001') to wind up the 9th respondent company, the petitioners applied for and obtained the leave of the court to make two minor amendments to it. Subsequently, however, D2-28-507-2001 was, upon the application of the respondents, struck out by the learned judge. On appeal by the petitioners, the Court of Appeal reversed the decision of the learned judge and ordered D2-28-507-2001 to be heard by another judge of the High Court. The respondents' application for leave to appeal to the Federal Court was also dismissed subsequently.

The petitioners then filed the instant application for leave to re-amend D2-28-507-2001 under s. 221(2)(e) of the Companies Act 1965 ('the Act') and/or O. 20 r. 5 of the Rules of the High Court 1980 ('RHC') and/or the inherent jurisdiction of the court. It was contended, *inter alia*, that 'significant events' had taken place between the parties subsequent to the filing of D2-28-507-2001.

Held (allowing the application):

[1a] The respondents' complaint – that the re-amendments now proposed by the petitioners in respect of D2-28-507-2001 were substantially similar to the 'new grounds' advanced by them in their **second** winding-up petition against the respondents ('D3-28-467-2002') – was misconceived. Indeed, D3-28-467-2002 was held to be unwarranted and was struck out because those 'new grounds' could be raised in evidence at the trial of D2-28-507-2001. Consequently, as those 'new grounds' were never determined on their merits in D3-28-467-2002, the doctrines of *res judicata* and *issue estoppel* would **not** bar them from being 'raised' as the present proposed re-amendments to D2-28-507-2001. There was no abuse of the process of the court on the part of the petitioners. (p 405 c-g)

[1b] The merits and veracity of the 'significant events' (*vis-à-vis* the proposed re-amendments to D2-28-507-2001) would be dealt with later in the proceedings and the respondents could then reply to them. (p 405 c-g)

[1c] The petitioners had a legitimate right to incorporate 'new events' into D2-28-507-2001 so as to table all the relevant facts before the court. (p 405 c-g)

[2] The proposed re-amendments to D2-28-507-2001 could be made under either s. 221(2)(e) of the Act or O. 20 r. 5 of the RHC. Order 20 r. 5 of the RHC – which applies primarily to pleadings – can, by virtue of O. 20 r. 7 thereof, be extended to cover the amendment of winding-up petitions as well. The inherent jurisdiction of the court could also be invoked for the same purpose. (pp 405 h & 406 a-d, g)

[3] The courts will generally allow such amendments as will cause no injustice to the other side. In determining whether an injustice might be occasioned, the court will consider: (i) whether the application is *bona fide*; (ii) whether any prejudice caused to the other side can be compensated by costs; and (iii) whether the proposed amendments

would turn the suit or petition into one of another and inconsistent character. The petitioners herein had satisfied these three tests and their proposed amendments to D2-28-507-2001 should, therefore, be allowed. The proposed amendments would not prejudice the respondents; indeed, they were crucial for a proper and fair determination of the disputes between the petitioners and the respondents. (pp 406 h, 407 a-g & 408 a)

[Petitioners' application allowed; costs of proceedings to respondents.]

Case(s) referred to:
Chaw Anui v. Tan Kim Chai [2002] 5 CLJ 79 HC ***(foll)***
Looi Guan Kway v. Low Lean Bok [1938] MLJ 35 ***(foll)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(foll)***

Legislation referred to:
Companies Act 1965, s. 221(2)(e)
Rules of the High Court 1980, O. 20 rr. 5, 7

For the petitioners - Cecil Abraham (MK Yee); M/s Shearn Delamore & Co
- Dato' Shafee (Azhar Azizan); M/s Shafee & Co
For the respondents - Lim Kian Leong (SS Sia); M/s Lim Kian Leong & Co

Reported by Gan Peng Chiang

JUDGMENT

Zulkefli Ahmad Makinudin J:
This is an application by the petitioners to seek leave of this court to re-amend the petition pursuant to s. 221(2)(e) of the Companies Act 1965 ("the Act") and/or under O. 20 r. 5 of the Rules of High Court 1980 ("RHC 1980") and/or under the inherent jurisdiction of the court. (encl. 93).

The following are some relevant background facts of the case:

(1) The petition was filed in court on 21 May 2001 as Companies Winding-up Petition No. D2-28-507-2001 and the first hearing date was fixed on 16 August 2001.

(2) On 18 July 2001, upon the application of the petitioners, the court granted leave for the petitioners to make minor amendments to the petition. The two amendments made were to insert s. 218(1)(i) of the Act and to substitute the name of the liquidator.

(3) On 9 October 2001 upon the application of the respondents, Her Ladyship Madam Justice Zainun bte Ali struck out this petition.

(4) The petitioners subsequently appealed to the Court of Appeal. On 29 January 2003, the Court of Appeal allowed the petitioners' appeal and set aside the High Court striking out order. The Court of Appeal further ordered that this petition be remitted to the High Court for trial before another judge. Hence, the hearing of this petition before this court as Companies Winding-up Petition No. D3(D2)-28-507-2001.

(5) The respondents then sought leave to appeal to the Federal Court on 25 February 2003. The Federal Court subsequently dismissed the respondents' leave application on 29 October 2003 *vide* Federal Court Application No. 08-13-2003 (W).

Petitioners' Contention And The Proposed Amendments

The petitioners contended that there have been significant events that have occurred between the parties subsequent to the filing of the petition, which could not be included in the initial petition. Hence this notice of motion was filed by the petitioners on 19 January 2004 before this court to re-amend the petition. The proposed amendments are contained in Annexure A of the notice of motion and the precise details are set out in para. 166 to paras. 234. The significant amendments can be categorized as follows:

(i) The marginalization and exclusion of the petitioners from management and participation in the Tan Chong Groups of Companies (Annexure A – paras. 168-176 at pp. 46-48);

(ii) Disregarding or endangering the distributorship (franchise) of Nissan Motor Ltd and Shiseido Ltd (Annexure A – paras. 177-190 at pp. 49-53); and

(iii) The ouster of the petitioners from key positions in Tan Chong Consolidated Sdn. Bhd. ("TCC") and in the Tan Chong Groups of Companies (Annexure A – paras. 191-200 at pp. 53-57).

The Respondents' Objections

The respondents' objections basically are as follows:

(i) The amendments are substantially the same as the 'new events' contended by the petitioners in the second petition filed by the petitioners which was struck out on 20 May 2003 by this court.

(ii) The 'new events' are irrelevant to a winding up petition against TCC and in any event the allegations do not give rise to any right of a shareholder of TCC to assert a breach of any legitimate expectation; and

(iii) The principle of "*res judicata*" and/or "issue estoppel" would apply to the proposed amendments since they are substantially the same as the 'new events' contained in the second petition which has been struck out and as such this application amounts to an abuse of process.

Decision Of The Court

I am of the view that the respondents' objections on the ground that the amendments are substantially the same as the 'new events' in the second petition filed by the petitioners are without merits. The striking out of the second petition by me then must be read in the proper context and cannot be used as a general bar to the petitioners raising the new events in this petition.

It must be read in the context of this family winding-up petition by the quasi-partners. In my decision in striking out the said second petition filed by the petitioners then I had *inter alia* stated that even if the petitioners are right in claiming that there are new grounds of facts, this cannot justify the filing of the second petition as the petitioners are still in a position to raise these facts or add as new grounds in evidence at the trial of the first petition. It would be wrong and inequitable for the respondents to seek to bar the petitioners from raising new events which may be caused by them. The merits or veracity of these new events are matters to be dealt with in the later course of these proceedings where the respondents are given their opportunity to reply.

In my view these new events have not been determined on their merits by this court. Hence the principles of "*res judicata*" and/or "Issue Estoppel" raised by the respondents do not apply. There is no abuse of process on the part of the petitioners. It is the petitioners' legitimate right to include new events into this petition so as to table all the relevant facts before the court. Furthermore, these amendments contain purely descriptions of factual events, which may be caused by the actions of the respondents.

As regards the law I find that the provision of s. 221(2)(e) of the Act allows the petitioners to make such amendments to the petition filed. Section 221(2)(e) of the Act provides as follows:

(2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition:

(e) allow the petition to be amended or withdrawn;

I am also of the view that O. 20 r. 5 of the RHC 1980 and the inherent jurisdiction of this court may be invoked and are applicable to the proposed amendment made by the petitioners. Order 20 r. 7 of RHC 1980 reads as follows:

Rule 5 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a writ.

Although at first glance, O. 20 r. 5 of the RHC 1980 appears to apply primarily to pleadings, and as such a petition would not fall within the scope of the said provision, I am of the view that this provision can be extended such that a court may give leave to amend a petition. I find support for such a contention in the light of the decision in *Chaw Anui v. Tan Kim Chai* [2002] 5 CLJ 79 wherein his lordship, Low Hop Bing J at p. 83 had this to say:

The procedure governing the amendment of a writ or pleading is contained in Order 20 r. 5(1) of the Rules of the High Court 1980 which reads:

5(1) Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

The word 'pleading' used in Order 20 r. 5(1) of the Rules of the High Court 1980 has, by virtue of Order 20 r. 7 been extended to include eg, a petition so that Order 20 r. 5 shall have effect in relation to a petition also.

Therefore, with regard to amendments to a petition, it is evident that O. 20 r. 5 read in conjunction with O. 20 r. 7 of the RHC 1980 would allow such amendments to be made by the petitioners as in the present case.

The general principles guiding the court in granting amendments are well settled by case laws wherein the court would allow such amendments as will cause no injustice to the other side. In order to determine whether an injustice will result certain other principles will have to be considered. In *Looi Guan Kway v. Low Lean Bok* [1938] MLJ 35 upon an application by the plaintiff to amend the pleadings, his lordship Atiken J enunciated three principles for the guidance of the court, namely:

(i) there is *bona fides* on the part of the applicant;

(ii) the amendments cause no prejudice to the other side which cannot be compensated by costs; and

(iii) they are not such as to turn a suit of one character into a suit of another and inconsistent character.

In *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; ([1983] CLJ (Rep) 428), the Federal Court in the judgment of Mohamed Azmi FJ at p. 192 (pp. 429-430) *inter alia* had this to say:

> Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of the Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must be of course be exercised judicially (see *Kam Hoy Trading v. Kam Fatt Tin Mine*). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs; and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character ... If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

Based on the facts and the circumstances of this case it is my finding that the petitioners in making this application to re-amend the petition have shown the following:

(i) That the amendments are *bona fide*;

(ii) That the amendments cause no prejudice to the respondents which cannot be compensated by costs; and

(iii) That the amendments are not such as to turn a suit of one character into a suit of another and inconsistent character.

a It is also my view that these amendments are crucial for a proper and fair determination of the disputes between the parties and they certainly cause no prejudice to the respondents. The respondents are at liberty to reply to address these issues and there is really no reason for any objection to the amendments.

b For the above stated reasons I hereby allow the petitioners' application (encl. 93) with an order that the respondents are to be compensated with costs by the petitioners for this proceeding.

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